Supreme Court of the United States

October Term, 1944.

No. 438

HOUBIGANT INC., CHERAMY INC., and HOUBIGANT SALES CORPORATION,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, AND SUPPORTING BRIEF.

ASHER BLUM,
Counsel for Petitioners.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Houbigant Inc., Cheramy Inc. and Houbigant Sales Corporation respectfully shows:

Your petitioners seek review of a judgment of the United States Circuit Court of Appeals entered June 9, 1944 (R. pp. 144 and 145). The opinion of the Circuit Court of Appeals (R. p. 132) is not officially reported.

Statement of Matter Involved.

The complaint of the Commission was filed on March 2, 1938 (R. p. 7).

The complaint (R. pp. 1-7), charged in Pars. 4-5, that petitioners had unlawfully labeled their perfumes, colognes, and toilet waters, in order falsely to ascribe French origin to domestic products.

The complaint is limited to the use of the accused designations on labels, tags, and bottles and invoices (Par. 5, p. 3). False advertising was not pleaded. The charge of unfair invoices was dropped. The Findings (R. p. 112, Par. 5) refer only to labels, markers, and containers.

As to Houbigant Inc., and Houbigant Sales Corporation, the Commission complained only of the use of

"Houbigant"

and of the combination

"Houbigant—Paris—New York" (R. p. 3, Par 5).

As to Cheramy Inc., the Commission complained only of the combination

"Cheramy—Paris—New York—France" (R. p. 3, Par. 5).

The Findings (R. p. 112, Par. 5), and the Commission's Order (R. p. 116, fols. 347 and 348) refer to certain additional marks, which were not pleaded in the complaint.

The Commission's complaint was filed on March 2, 1938, under the Federal Trade Commission Act, 15 U. S. C. A. 41-51. This was prior to the enactment of the Wheeler-Lea Act on March 21, 1938 (15 U. S. C. A. 52-58), and prior to the enactment of the Federal Food, Drug & Cosmetic Act on June 25, 1938 (21 U. S. C. A. 301-392; 52 Stat. 1040).

The Findings and Order of the Commission (R. pp. 109-116) were made and entered on April 16, 1942, which was long after the Federal Food, Drug & Cosmetic Act had gone into effect.

Houbigant Inc. is the American successor to a French perfume house, namely, "Parfumerie Houbigant" (R. pp. 25 and 26, fols. 75 and 76; p. 42, fol. 126; p. 43, fol. 127).

A perfume is a solution of a perfume concentrate in alcohol. Houbigant Inc. imported the concentrates from Parfumerie Houbigant, and it dissolved the imported concentrates in domestic alcohol (R. p. 29, fols. 85-88). It was stipulated (R. p. 104, fols. 311-312) that the value of the domestic alcohol was 10% of the value of the finished perfume.

Houbigant Sales Corporation is a selling agent of Houbigant Inc.

"Houbigant" is a French surname.

The Commission took no testimony about the effect of the "Cheramy" labeling.

Jurisdiction.

This is based on 28 U. S. C. A. 347 and 15 U. S. C. A. 45 (g) (h) (j).

Questions Presented For Review.

A. Whether the Commission, subsequent to the enactment of the Federal Food, Drug & Cosmetic Act, had jurisdiction to regulate markings on labels and containers of perfumes or other cosmetics.

B. Whether the Commission, upon the evidence, should have enjoined petitioners (R. p. 116, fol. 348) from using their corporate names or trademarks, unless they stated that their products were made in the United States.

C. Whether the Commission had the power, irrespective of the evidence, to grant an order of the scope herein.

Reasons For Allowance of Writ.

This case presents a conflict between the alleged authority of the Commission over the labeling of perfumes, and the authority of the Federal Security Administrator, who has the authority to enforce the Federal Food, Drug & Cosmetic Act under the Reorganization Act of April 3, 1939, 5 U. S. C. A. Sec. 133.

Regulations under the Federal Food, Drug & Cosmetic Act were promulgated on Dec. 22, 1938. All of these regulations became effective on June 25, 1939. This was almost three years prior to the date on which the Commission made its Findings and Order, namely, April 16, 1942.

Petitioners have fully complied with said regulations, and with the Federal Food, Drug & Cosmetic Act. No proceeding has ever been instituted against petitioners under the Federal Food, Drug & Cosmetic Act.

The matter is of great importance to the food, drug, and cosmetic industries.

They are subjected to dual, independent, and conflicting authorities.

The decision herein is in conflict with,

United Corporation v. *Federal Trade Commission,* 110 Fed. (2d) 473, C. C. A. 4;

Chamber of Commerce v. *Federal Trade Commission,* 13 Fed. (2d) 673, C. C. A. 8;

U. S. v. *Lee,* 40 Fed. Supp. 802, 131 Fed. (2d) 464, C. C. A. 7;

George H. Lee Co. v. *Federal Trade Commission,* 113 Fed. (2d) 583, C. C. A. 8.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of

this Honorable Court directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of said United States Circuit Court of Appeals be reversed; and that your petitioners shall have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ASHER BLUM,
Counsel for Petitioners.